

HON. BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUGET SOUNDKEEPER ALLIANCE,

Plaintiff,

v.

SSA TERMINALS (TACOMA), LLC; and SSA
TERMINALS, LLC,

Defendants,

and

PORT OF TACOMA,

Crossclaim
Plaintiff/
Counterclaim
Defendant

v.

APM TERMINALS TACOMA LLC;

Crossclaim
Defendant/Counter
claim Plaintiff.

No. 3:17-cv-05016-BHS

**JOINT STATUS REPORT AND
DISCOVERY PLAN**

In accordance with the Court's Orders of April 24, 2019 (Dkt. 244) and December 3, 2020 (Dkt. 308) and Federal Rules of Civil Procedure 26(f)(2) and (3), APM Terminals Tacoma LLC ("APMT"), Port of Tacoma ("the Port"), SSA Terminals (Tacoma), LLC ("SSATT"), SSA Terminals, LLC ("SSAT") (collectively "SSA") and Puget Soundkeeper Alliance

1 (“Soundkeeper”), (collectively “the Parties”) hereby submit their Combined Joint Status Report
2 and Discovery Plan.

3 **1. NATURE AND COMPLEXITY OF THE CASE**

4 Soundkeeper originally commenced this matter as a citizen suit under the Clean Water
5 Act (“CWA”) against APMT alleging, inter alia, that APMT had failed to construct a stormwater
6 treatment system required by the Industrial Stormwater General Permit (“ISGP”) at the West
7 Sitcum Terminal (“Terminal”). After APMT terminated operations, SSA leased the Terminal
8 from the Port, and the Port agreed in October 2017 to install a treatment system for the Terminal.
9 Dkt. 305 at 8. In November 2017, Soundkeeper amended its complaint to add the Port as a
10 defendant. Dkt. 75. In June 2018 Soundkeeper filed an amended complaint adding SSAT and
11 its parent, SSA Marine, Inc., as defendants, and the Port asserted crossclaims against APMT.
12 Dkt. 260. In August 2018 the Court rejected a proposed consent decree between Soundkeeper
13 and APMT that “wrongfully purports to foreclose the Port’s . . . crossclaims against APMT.”
14 Dkt. 138 at 3. On January 19, 2019, the Court granted SSA Marine and SSAT’s motion to
15 dismiss Soundkeeper’s CWA claims because they were premised on a 60-day notice letter sent
16 prior to SSAT’s tenancy. On February 14, 2019, SSAT filed a motion for an award of attorneys’
17 fees and costs. On June 4, 2019 the Court denied the motion without prejudice. On February 14,
18 2019 the Court approved the Revised Consent Decree through which Soundkeeper and APMT
19 settled Soundkeeper’s claims against APMT and Soundkeeper agreed “to dismiss with prejudice
20 all claims for penalties against the Port alleged in the Third Amended Complaint for violations
21 occurring prior to October 2, 2017 and any and all claims against the Port for violations not
22 involving acts or omissions of the Port.” Dkt 224 at 3-4. On June 5, 2019 Soundkeeper filed its
23 Fourth Amended Complaint adding SSAT and SSATT as defendants.

24 On November 3, 2020 the Court granted the Port’s motion for partial summary judgment
25 regarding the scope of ISGP coverage and Soundkeeper’s claims. Dkt. 304. On November 17,

1 2020 the Court granted the Port's summary judgment motion on Soundkeeper's remaining
2 claims and instructed the clerk to terminate the Port as a defendant. Dkt. 305 at 16.
3 Soundkeeper did not seek reconsideration of either ruling. Soundkeeper has not dismissed its
4 claims against SSA.

5 On November 19, 2020 the Court granted in part and denied in part APMT's motion to
6 dismiss the Port's crossclaims. Dkt. 306. On December 11, 2020, APMT answered the Port's
7 remaining crossclaims and asserted counterclaims against the Port. Dkt. 309.

8 The only claims now remaining for resolution in this litigation are Soundkeeper's claims
9 against SSA, the Port's crossclaims against APMT, and APMT's counterclaims against the Port.
10 The Port's action against APMT involves claims arising from APMT's 1983 lease with the Port.
11 The Port contends APMT breached its lease obligations, including by failing to indemnify/hold
12 harmless the Port; failing to comply with the CWA, the ISGP, and local, state and federal laws
13 implementing the CWA. The Port contends it has been and continues to be damaged by
14 APMT's acts and omissions well in excess of a letter of credit provided by APMT to secure its
15 lease obligations. Accordingly, the Port's claims in the case involve questions of contract
16 interpretation; application of the CWA's regulatory programs; decisions, data and records related
17 to that program and the lease; and expert testimony.

18 APMT denies the Port's claims in their entirety, and asserts counterclaims for conversion,
19 fraud, breach of contract, and breach of the duty of good faith and fair dealing in connection with
20 the 1983 lease and a letter of credit APMT posted pursuant to the lease as security in the event
21 the Port was unable to lease the terminal to another tenant following a default by APMT. APMT
22 contends that the Port, more than seven months after APMT terminated the lease and vacated the
23 terminal, and without any notice to APMT, converted the full amount of the letter of credit by
24 fraudulently executing a false certification to the New York branch office of Svenska
25 Handelsbanken causing the bank to release the full amount of the letter of credit to the Port. The

1 false certification submitted to the bank for the release of the letter of credit was executed by the
2 then Deputy Chief Executive Officer of the Port. APMT has provided notice of its claim against
3 the former Deputy Chief Executive Officer of the Port.

4 The Port and SSA believe that the Court's November 3rd and November 17th Orders
5 conclusively establish that there was no "ongoing violation" in June 2019 when Soundkeeper
6 added SSA back into the case and that Soundkeeper failed to identify any CWA violation prior to
7 October 2019. As a result, they intend to seek dismissal of Soundkeeper's remaining claims
8 against SSA, a FRCP 54(b) determination, and additional relief. The Port favors a briefing
9 schedule on the Port's and APMT's breach claims, the Port and SSA favor bifurcation of the
10 Port's crossclaims and APMT's counterclaims from Soundkeeper's remaining claims, and the
11 Port favors a stay of the Port's crossclaims and APMT's counterclaims pending a final judgment
12 in Soundkeeper's lawsuit against SSA.

13 APMT also favors a briefing schedule on the Port's and APMT's claims and bifurcation
14 of the Port's crossclaims and APMT's counterclaims from Soundkeeper's remaining claims, but
15 does not believe that the briefing schedule should be an exception to the bifurcation and does not
16 favor a stay of the Port's crossclaims and APMT's counterclaims pending a final judgment in
17 Soundkeeper's lawsuit against SSAT and SSATT.

18 The Court's November 3, 2020 and November 17, 2020 Orders granting the Port's
19 motions for summary judgment and dismissing the Port did not address the status of SSA in this
20 matter. SSA believes that given the facts and law set forth in the Court's Orders they should
21 likewise be dismissed with prejudice on the identical basis as the Port. SSA has requested
22 Soundkeeper to both stipulate to the dismissal and to finalization of the Orders per FRCP 54(b).
23 Soundkeeper has indicated it is opposed to both requests. As a result of the disagreement
24 between SSA and Soundkeeper, SSA will be bringing a motion to dismiss and may request fees.
25 SSA, along with the Port, will also seek FRCP 54(b) certification of the Court's Orders. SSA
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1 strenuously opposes the lifting of the stay and resumption of discovery until after its motion to
 2 dismiss is ruled upon. SSA contends that such activities are likely pointless and incur
 3 unnecessary fees and costs for both parties.

4 Soundkeeper believes that dismissal of SSA is inappropriate. The Court's November 3,
 5 2020 Order did not address any of Soundkeeper's Claims against SSA. The Court has also held
 6 that SSA is a proper party to this case. Dkt. 253. Furthermore, as discovery has been stayed for
 7 the past two years, Soundkeeper has been unable to determine if SSA has accumulated additional
 8 violations of the Industrial Stormwater General Permit during that time. Soundkeeper intends to
 9 conduct discovery as to this time period. SSA have not provided Soundkeeper with any specific
 10 proposal as to their dismissal. Soundkeeper will consider SSA's motion to dismiss when it is
 11 received.

12 **2. PROPOSED DEADLINE TO JOIN ADDITIONAL PARTIES**

13 Solely with respect to their claims, the Port and APMT propose a deadline of July 2,
 14 2021.

15 **3. UNITED STATES MAGISTRATE JUDGE**

16 The parties do not consent to a United States Magistrate Judge.

17 **4. DISCOVERY PLAN (FED. R. CIV. P. 26(f)(3))**

18 A. Initial disclosures

19 The Port and APMT do not request any changes to the timing, form, or requirement for
 20 disclosure under Rule 26(a). The Port will provide its initial disclosures by January 6, 2021.
 21 The Port contends that APMT provided initial disclosures with respect to PSA's claims, but has
 22 not provided initial disclosures regarding its claims against the Port.

23 APMT provided its initial disclosures on May 4, 2017, and will supplement its initial
 24 disclosures by January 6, 2021. APMT has agreed that the Port can provide its initial
 25 disclosures by January 6, 2021.

1 SSA's position is that if the Court denies SSA's planned motion to dismiss, SSA and
2 Soundkeeper will provide initial disclosures within fourteen (14) days of the Court's decision.

3 Soundkeeper's position is that Soundkeeper and SSA should exchange initial disclosures
4 by January 6, 2021. Soundkeeper's initial disclosures will be supplemental, as Soundkeeper has
5 already provided initial disclosures in this matter.

6 B. Subjects, timing, and potential phasing of discovery

7 The subjects on which the Port may need discovery include the APMT-Port lease
8 agreement; APMT's internal and external communications related to stormwater management,
9 including the Industrial Stormwater General Permit; APMT's compliance/noncompliance with
10 the Clean Water Act and lease; APMT's defenses and counterclaims; APMT's purported
11 damages; and the opinions of expert witnesses.

12 The subjects on which APMT may need discovery include the APMT-Port lease, the
13 Port's internal and external communication related to the lease and its termination, the Port's
14 remaining cross-claims, the Port's defenses to APMT's Counterclaim, the Port's securing of a
15 new tenant at the terminal following APMT's termination of the lease, the Port's alleged
16 damages, the Port's communications with the Washington Department of Ecology, the Port's and
17 its officer's conduct related to the execution and presentation of a sight draft to Svenska
18 Handelsbanken to obtain the bank's release of the letter of credit, the Port's lease agreements
19 with subsequent tenants, and the opinions of expert witnesses.

20 The Port's ultimate claims and damages may be affected by the final disposition of
21 Soundkeeper's concurrent parallel litigation against SSA in this matter. The Port further
22 contends that an initial ruling on the Port's and APMT's breach claims may facilitate settlement
23 and enable the parties to address the economic loss rule relative to APMT's remaining claims.
24 The Port endorses phased discovery and initial motions practice on the Port's and APMT's
25 breach claims and a stay of the remaining APMT claims pending a final judgment in
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1 Soundkeeper's lawsuit against SSA. The Port will propose a briefing schedule for approval by
2 the court.

3 APMT endorses phased discovery and initial motions practice on the Port's and APMT's
4 claims. APMT will propose a joint briefing schedule for approval by the court. APMT denies
5 that the Port's ultimate claims and damages may be affected by the final disposition of
6 Soundkeeper's concurrent parallel litigation against SSA in this matter. APMT favors
7 bifurcation of the Port's crossclaims and APMT's counterclaims from Soundkeeper's remaining
8 claims. APMT does not favor a stay of the Port's crossclaims and APMT's counterclaims
9 pending a final judgment in Soundkeeper's lawsuit against SSA.

10 Soundkeeper is opposed to bifurcation. Should any party wish to file a motion for
11 bifurcation, Soundkeeper will consider such a motion at that time.

12 The Port and APMT generally agree to conduct discovery cooperatively and to look for
13 efficient and inexpensive resolution of discovery issues. The Port and APMT agree to share
14 discovery from third parties; to schedule discovery or case management conferences with the
15 judge assigned to the case as necessary; and present discovery disputes to the court by informal
16 means.

17 SSA's position is that SSA and Soundkeeper cannot at this time propose a discovery plan
18 or respond to the remaining matters listed below given the uncertain status of Soundkeeper's
19 claims against SSA. Should the Court deny SSA's upcoming motion to dismiss, then SSA and
20 Soundkeeper will submit a discovery plan and responses to the remaining matters listed below
21 within fourteen (14) days of the Court's ruling.

22 Soundkeeper's position is that discovery as between Soundkeeper and SSA should be
23 reopened immediately, rather than waiting for the Court to rule on SSA's motion to dismiss,
24 which has not been filed yet. The subjects on which discovery may be needed include SSA's
25 compliance/noncompliance with the Industrial Stormwater General Permit, means to control
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1 stormwater pollution at SSA's facility, the application of the penalty factors identified at 33
2 U.S.C. § 1319(d), Soundkeeper's compliance/noncompliance with applicable requirements and
3 conditions of the CWA to bring and maintain this action, and SSA's affirmative defenses.
4 Soundkeeper does not believe that phased discovery as between Soundkeeper and SSA is
5 warranted. To promote the expeditious and inexpensive resolution of the case, Soundkeeper
6 agrees to work cooperatively. With regard to timing, Soundkeeper believes discovery can be
7 completed 120 days prior to the trial date.

8 C. Electronically stored information

9 The Port and APMT anticipate its case will involve the preservation of ESI and have each
10 maintained a litigation hold since 2017. The Port and APMT have discussed the nature, location,
11 and scope of discoverable ESI. The Port expects to adopt the Model Agreement Regarding
12 Discovery of Electronically Stored Information. APMT may propose changes to the Model
13 Agreement.

14 As between Soundkeeper and SSA, Soundkeeper anticipates this case will involve
15 preservation and production of ESI. Soundkeeper proposes that Soundkeeper and SSA agree to
16 follow the Model Protocol for Discovery of ESI.

17 D. Privilege issues

18 The Port and APMT will jointly ask the court to enter a mutually acceptable order under
19 FRE 502.

20 As between Soundkeeper and SSA, neither SSA nor Soundkeeper is aware of any unique
21 or extensive claims of privilege.

22 E. Proposed limitations on discovery

23 The parties do not currently propose limitations on discovery beyond those provided
24 under federal or local rules.

1 F. The need for discovery related orders

2 The parties do not currently foresee the need for any other orders that the court should
3 issue under Rule 26(c) or under Rule 16(b) and (c).

4 **5. THE PARTIES' VIEWS, PROPOSAL AND AGREEMENTS (LOCAL**
5 **CIVIL RULE 26(f)(1), (2)).**

6 A. Prompt case resolution

7 The Port and APMT intend to continue discussing case resolution.

8 As to Soundkeeper, SSA anticipates filing a dispositive motion.

9 B. Alternative Dispute Resolution

10 The Port and APMT commit to alternative dispute resolution per LCR 39.1 within 120
11 days before trial. The Port and APMT will evaluate the assistance of a magistrate judge for
12 settlement conferences.

13 Soundkeeper's position as to SSA is that Soundkeeper proposes to use mediation as ADR
14 under Local Rule CR 39.1. Soundkeeper proposes a mediation deadline of 30 days after the
15 discovery cutoff.

16 C. Related cases

17 A consolidated appeal of the 2020 Industrial Stormwater General Permit before the
18 Washington Pollution Control Hearings Board is a related case per LCR 26(f)(1)(C). *Puget*
19 *Soundkeeper Alliance, et. al v. State of Washington, Dep't of Ecology*, PCHB No. 19-089c. That
20 appeal is the subject of a Notice of Pendency, Dkt. 298.

21 D. Discovery management

22 The parties do not currently foresee issues with disclosure, discovery or preservation of
23 ESI and will work collaboratively if issues arise.

24 E. Anticipated discovery sought

25 The provisions of Paragraph 4(B) above, are incorporated herein by reference.

1 F. Phasing motions

2 The Port endorses phased discovery and initial motions practice on the Port's and
3 APMT's breach claims.

4 APMT endorses phased discovery and initial motions practice on the Port's and APMT's
5 claims.

6 Soundkeeper does not propose phasing motions, beyond the deadlines normally set by the
7 Court.

8 G. Preservation of discoverable information

9 The Port and APMT have not identified any preliminary issues relating to the
10 preservation of discoverable information and the scope of the preservation obligation.

11 Soundkeeper has not identified any issues relating to the preservation of discoverable
12 information.

13 H. Privilege issues

14 The provisions of Paragraph 4(D) above, are incorporated herein by reference.

15 I. Model protocol for Discovery ESI

16 The provisions of Paragraph 4(C) above, are incorporated herein by reference.

17 J. Alternatives to model protocol

18 The provisions of Paragraph 4(C) above, are incorporated herein by reference.

19 **6. COMPLETION OF DISCOVERY**

20 The Port and APMT propose that all discovery, including written discovery and
21 depositions be completed no later than 120 days before the trial date.

22 As to Soundkeeper and SSA, the parties propose that all discovery be completed no later
23 than 120 days before the trial date.

1 **7. BIFURCATION**

2 The Port endorses phased discovery and initial motions practice on the Port's and
 3 APMT's breach claims. The Port will propose a briefing schedule for approval by the Court.
 4 The Port's ultimate claims and damages may be affected by the final disposition of
 5 Soundkeeper's concurrent parallel litigation against SSA in this matter. The Port and SSA
 6 intend to seek dismissal of Soundkeeper's remaining claims, a FRCP 54(b) determination, and
 7 additional relief. Therefore, the Port favors a briefing schedule on the Port's and APMT's
 8 breach claims and economic loss rule, the Port and SSA favor bifurcation of the Port's
 9 crossclaims and APMT's counterclaims from Soundkeeper's remaining claims and the Port
 10 favors a stay of the Port's crossclaims and APMT's counterclaims pending a final judgment in
 11 Soundkeeper's lawsuit against SSA.

12 APMT endorses phased discovery and initial motions practice on the Port's and APMT's
 13 claims. APMT will work with the Port to propose a briefing schedule for approval by the Court.
 14 APMT denies that the Port's ultimate claims and damages may be affected by the final
 15 disposition of Soundkeeper's concurrent parallel litigation against SSA in this matter. APMT
 16 does not favor a stay of the Port's crossclaims and APMT's counterclaims pending a final
 17 judgment in Soundkeeper's lawsuit against SSA.

18 Soundkeeper's opposes bifurcation. If any party wishes to file a motion for bifurcation,
 19 Soundkeeper will consider such a motion at that time.

20 **8. PRETRIAL STATEMENTS**

21 The parties do not propose to dispense with pretrial statements or pretrial order at this
 22 time. The Port, APMT, and Soundkeeper are not requesting to use an abbreviated pretrial order
 23 and are not requesting other orders under LCR 16(b) and (c) at this time.

1 **9. INDIVIDUAL TRIAL PROGRAM**

2 The Port, APMT, and Soundkeeper do not believe that the individualized trial program is
3 appropriate in this case.

4 **10. SUGGESTIONS FOR SHORTENING/SIMPLIFYING THE CASE**

5 The Port endorses phased discovery and initial motions practice on the Port's and
6 APMT's breach claims. The Port will propose a briefing schedule for approval by the court.

7 APMT endorses phased discovery and initial motions practice on the Port's and APMT's
8 claims. APMT will work with the Port to propose a joint briefing schedule for approval by the
9 Court.

10 **11. DATE READY FOR TRIAL**

11 The Port-APMT case will be ready for trial in May 2022.

12 SSA will file a motion to dismiss Soundkeeper's claims, and should that motion to
13 dismiss be denied, Soundkeeper and SSA anticipate that the Soundkeeper-SSA case will be
14 ready for trial in January 2022.

15 **12. JURY TRIAL OR BENCH TRIAL**

16 The Port requests a jury trial.

17 APMT request a non-jury trial.

18 Soundkeeper requests a non-jury trial for the Soundkeeper-SSA case.

19 **13. NUMBER OF DAYS REQUIRED**

20 APMT and the Port estimate 3 weeks would be needed for trial.

21 Soundkeeper and SSA estimate that ten trial days will be necessary for the SSAT-SSATT
22 trial.

1 **14. TRIAL COUNSEL**

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15. SCHEDULING CONFLICTS

Counsel for Soundkeeper Alyssa Englebrecht is unavailable June 13, 2022 to June 21, 2022.

Counsel for APMT Christopher J. McAuliffe is unavailable July 26, 2021 through July 30, 2021.

Counsel for the Port Bradford Doll is unavailable July 2, 2021 through July 6, 2021.

16. SERVICE

All named parties have been served.

17. SCHEDULING CONFERENCE

18. CORPORATE DISCLOSURE STATEMENT

The Port is a governmental entity.

APMT filed its Corporate Disclosure Statement on February 17, 2017 (Dkt. # 10).

Soundkeeper filed its Corporate Disclosure Statement on January 17, 2017 (Dkt. # 5).

SSA Marine, Inc. filed its Corporate Disclosure Statement on June 29, 2018 (Dkt. # 122).

SSAT filed its Corporate Disclosure Statement on June 29, 2018 (Dkt. # 123).

DATED this 18th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

DATED at Seattle, Washington this 18th day of December, 2020.

s/ Bradford Doll
Bradford Doll, WSBA #38479

4839-4303-0484, v. 1